WILLIE N. COOK

IBLA 87-352 Decided february 23, 1989

Appeal from a decision of the Assistant Director, Western Field Operations, Office of Surface Mining Reclamation and Enforcement, refusing to act on citizen's complaint regarding surface mining operation. No. 86-39.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Impoundments: Generally--Surface Mining Control and Reclamation Act of 1977: Postmining Land Use: Generally--Surface Mining Control and Reclamation Act of 1977: Topsoil: Redistribution

   Where OSMRE has assumed direct Federal enforcement of a state program, it properly declines to take enforcement action in response to a citizen's complaint where the complainant fails to establish any violation of the state equivalent of the Surface Mining Control and Reclamation Act of 1977, as amended, 30 U.S.C. || 1201- 1328 (1982), or its implementing regulations as a result of the mine operator's construction of a permanent water impoundment and drainage channel, removal and placement of topsoil within the permitted area, and filling in of an open pit on adjacent nonpermitted land.

APPEARANCES: Willie N. Cook, pro se; Ralph O. Canaday, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Office of the Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Willie N. Cook has appealed from a March 12, 1987, decision of the Assistant Director, Western Field Operations, Office of Surface Mining Reclamation and Enforcement (OSMRE), refusing to act on his citizen's complaint (No. 86-39) regarding violations he believed to exist at the Alpine No. 5 mine (State permit No. 82/87-4059) operated by the Alpine Construction Company, Inc. (Alpine), in Haskell County, Oklahoma. The

complaint was filed pursuant to section 517(h) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1267(h) (1982), and 30 CFR 842.12.

Cook is the owner of private land located on the southeastern boundary of Alpine's surface coal mining operation situated in sec. 13, T. 10 N., R. 21 E., Indian Meridian, Haskell County, Oklahoma, which land is both within and outside the permitted area. The record is unclear as to whether Alpine was still actively mining this site at the times involved in the present appeal. However, it appears that, in any case, surface coal mining and reclamation operations had not been fully completed. It should also be noted that, at all relevant times, OSMRE had assumed direct Federal enforcement of the Oklahoma permanent regulatory program with respect to the subject permit. See 30 CFR 936.17 (1987); Clifford Mackey, 99 IBLA 285, 289 (1987).

On December 19, 1986, OSMRE received from the Oklahoma Department of Mines (ODOM) a copy of a letter from Cook to ODOM indicating five areas of concern regarding the operation of the Alpine No. 5 mine. Specifically, Cook asserted that (1) Alpine had cut off, by means of an open pit, access to his property from the Tamaha Road, a paved county road to the west, across the permitted area; (2) filled in an open pit located on his property out of the permit area; (3) dug a channel (approximately 300 feet long, 30-40 feet wide, and 20-25 feet deep) located within and outside his property within the permitted area, thereby cutting off access to the eastern portion of his property; and (4) removed topsoil from his property within the permitted area and placed it on other private land also within the permitted area. Attached to the letter was a map of the permitted area with hand-drawn additions indicating the locations of the challenged activity.

On December 29, 1986, OSMRE received a letter directly from Cook repeating and revising the concerns contained in his previous letter, viz., cutting off access from the Tamaha Road, filling in the open pit, digging a channel (approximately 300 feet long, 25-30 feet wide, and 15 feet deep), and removing topsoil. A revised map depicting the locations of these activities, however, somewhat changed the situs of two of the activities. Thus, the pit which was purportedly filled in was located on Cook's property within and outside the permitted area and the channel which was purportedly dug was located within and outside both his property and the permitted area. In addition, Cook asserted that "already reclaimed" topsoil had also been removed from his property and placed on other private land within the permitted area.

The record indicates that, in response to Cook's letters, OSMRE reclamation specialists Joe C. Funk and David J. Dossett conducted inspections of the minesite on January 2 and 22, 1987. The results of those inspections are contained in a one-page investigation report which addressed each of the concerns identified in Cook's letter received December 29, 1986.

With respect to cutting off access from the Tamaha Road by means of the open pit, the inspection report stated that while this represented an inconvenience for Cook, the pit was a "permanent water impoundment" provided for in the State permit. With respect to filling in the open pit, the report

stated that a small portion of the pit had been filled in off the permit at the request of Cook. As proof that Cook had authorized the partial filling in of the pit, the report referred to a July 14, 1986, letter from Alpine to ODOM which is included in the record, and which stated that, at the request of Cook, Alpine was constructing a ramp leading into an existing pit located over the permit boundary line. The letter continued: "The pit is empty now but the landowner thinks it will fill again when Alpine leaves a final pit at the end of mining in this increment. The ramp will make it possible for the cattle in this area to use this water source." With respect to digging a channel, the report stated that Alpine "has corrected this problem." Finally, with respect to removing topsoil and placing it on other areas, the report stated:

> The approved permit gives the coal company permission to do this with the provision that 6" of topsoil be replaced on all areas. The permit does not address differences in topsoil quality or quantity as related to property owners. Since no prime farmland soils were involved, no violation was found.

In conclusion, the report stated that "no violation can be cited by OSM[RE] at this time but additional field observation will be made concerning the redistribution of the topsoil."

By letter dated January 26, 1987, OSMRE provided Cook with a copy of the inspection report and informed him that under 30 CFR 842.15 he had a right to request an informal review of the decision not to take enforcement action. On February 18, 1987, Cook filed his request for informal review with the Director, OSMRE.

With respect to cutting off access from the Tamaha Road, Cook stated that this represented more than an inconvenience, effectively denying him the access he previously enjoyed. He suggested the construction of a dirt dam across the open pit to his west as a means of restoring access. As to filling in the open pit that was on his property, Cook stated that this was done without his permission and that he was notified by Alpine after the fact. Cook stated that Alpine had not corrected the problem with the channel: "On the back side of my property, Alpine has my access cut off again. They took dirt out of this area (out of the permit area). They left this straight up, approx[imately] 10' deep." Finally, with respect to removing topsoil and placing it on other areas, Cook stated that he and Funk had "checked my area for topsoil and there was none, all subsoil."

In response to Cook's request for an informal review, OSMRE reclama-tion specialist Michael A. Lett, in the company of Cook, conducted another inspection of the minesite on March 2, 1987. The results of that inspection are contained in a two-page investigation review report which is summarized below, and includes photographs of the area.

Concerning cutting off access from the Tamaha Road, Lett stated that the permanent water impoundment was merely the replacement of the structure which had cut off access to his property "prior to mining by Alpine." As to

filling in the open pit on Cook's land off permit, he stated that the question of whether Cook had given permission for this activity is "between Alpine and the landowner" where the activity occurred outside the permitted area. With respect to the removal of dirt cutting off access to the eastern portion of Cook's property, he further stated that this would "have to be resolved with Alpine, as it did not involve surface mining or areas on the permit." Finally, with respect to removing topsoil and placing it on other areas, he stated generally that, after the completion of mining, the applicable regulation "does not require topsoil to be placed on the same area it originated [from]." He further stated that, from an aerial photograph of the minesite, he had determined the areas of Cook's property originally covered by topsoil prior to Alpine's mining and concluded that topsoil had been replaced on the 3 acres where it had been removed. Lett stated that in the remaining area, identified by Cook, same subsoil had been used, but explained: "This was a pre-mined area and no topsoil was available; therefore, the subsoil was used in the belief that subsoil is a better growth media than the alternative (shale)." In conclusion, Lett stated that "[n]o violations were observed."

In his March 12, 1987 decision, the Assistant Director, enclosed a copy of the report, concluding that the report had not identified any deficiencies in the original investigation and therefore did not require the issuance of a notice of violation to Alpine. Cook has appealed from that decision.

In his statement of reasons for appeal (SOR), appellant contends that OSMRE should have cited Alpine for violations, challenging OSMRE's conclusions with respect to each of his areas of concern. With respect to cutting off access from the Tamaha Road, appellant contends that he originally had access to part of his property, which area is now cut off by the open pit, and again suggests construction of a dam across the pit as a means of restoring access. With respect to filling in the open pit situated outside of the permit area, appellant contends that it involved surface mining as "all of the overburden was pushed in the open pit from the new pit," without appellant's permission. With respect to digging a channel, appellant contends that Alpine created the channel, with sides 10 to 15 feet deep, which cuts across his property and effectively precludes access. Finally, with respect to removing topsoil and placing it on other areas, appellant contends that topsoil which should properly have been used to reclaim his property was removed from that property. OSMRE has filed an answer to appellant's SOR.

[1] Section 517(h) of SMCRA provides a mechanism whereby any person who is or may be adversely affected by a surface mining operation may notify OSMRE of "any violation of [SMCRA] which he has reason to believe exists at [a] surface mining site." 30 U.S.C. | 1267(h) (1982). In response to such a citizen complaint where OSMRE has assumed direct Federal enforcement of a state program, OSMRE must decide whether to inspect the minesite and whether to take enforcement action, either by issuing a notice of violation or cessation order. Where OSMRE decides not to inspect or inspects but concludes that no violation exists and thus refuses to take enforcement action, the statute requires the Secretary of the Interior to establish procedures for

informal review of such a decision. Id. Departmental regulations specifically provide for informal review by the Director, OSMRE, or his designated representative, of the decision "not to inspect or take appropriate enforcement action with respect to any [alleged] violation," and for further review by the Board. 30 CFR 842.15; Hazel King, 96 IBLA 216, 94 I.D. 89 (1987).

The question to be addressed on review is essentially whether or not there was a violation of SMCRA or its implementing regulations which should properly have been the subject of a Federal inspection and/or enforcement action. Clifford Mackey, supra at 289, Hazel King, supra at 237-38, 94 I.D. at 100-01. In the present case, because OSMRE was directly enforcing the Oklahoma permanent regulatory program, the question becomes whether there was a violation of the State equivalent of SMCRA or its implementing regulations.

After carefully reviewing appellant's concerns regarding the subject mining operation, we are not persuaded that appellant has identified any violation of the State equivalent of SMCRA or its implementing regulations which should properly have been the subject of a Federal enforcement action.

We start first with appellant's allegation that Alpine, during the course of its mining operations, cut off access to appellant's property by constructing an open pit within the permitted area. OSMRE contends that because there was a pit cutting off access to appellant's property from the Tamaha Road prior to any mining by Alpine and this condition did not change either during or after mining by Alpine, OSMRE had no authority to cite Alpine for a situation "that occurred before Alpine began mining." As proof that there was an existing pit at the time Alpine began mining, OSMRE refers to an aerial photograph of the minesite taken July 3, 1979. That photograph depicts a narrow body of water below the level of the surrounding land running south-southwest within the permitted area through the SW^ of sec. 13, across appellant's property. This, apparently, was the pre-existing open pit.

In the maps depicting the minesite submitted by appellant, the post- mining open pit is drawn somewhat to the west of, but essentially running parallel to, the location of the water as shown on the aerial photograph. From appellant's maps, it appears that, during the course of its mining operations, Alpine replaced the pre-existing pit with a similar pit just to the west. In its initial investigation report, OSMRE described the post-mining pit as the "permanent water impoundment" provided for in Alpine's State permit. Photographs in the record taken in February 1987 depict Cook's access crossing a small body of water at this impoundment and reveal tire tracks nearby from vehicles that had evidently negotiated the crossing.

In these circumstances, we can discern no violation of the State equivalent of SMCRA or its implementing regulations. It is clear that, prior to the mining undertaken by Alpine, appellant's access to his property from the Tamaha Road crossed a pre-existing open pit. Moreover, there is no evidence that the quality of that access materially changed as a result of Alpine's mining operations. Such access still crosses a narrow body of water, albeit evidently not in the same exact position. Appellant has not

identified and we are not aware of any statutory or regulatory provision which would require a mine operator to improve pre-existing access to a particular parcel of land during or after the completion of its mining operations where such operations have not materially affected such access. Accordingly, Alpine could not be required to do so. Likewise, there was no basis for OSMRE to charge Alpine with a violation of the State equivalent of SMCRA or its implementing regulations where Alpine failed to improve such access. Moreover, appellant has identified no basis for concluding that the impoundment itself violates any statutory or regulatory provision. See 30 U.S.C. | 1265(b)(8) (1982); 30 CFR 816.49; Wayne Yarnell, 3 IBSMA 188, 88 I.D. 652 (1981).

Next, appellant alleges that Alpine, during the course of its mining operations, filled in an open pit situated outside the permitted area. 1/ It is not disputed that the pit was filled in to some degree by Alpine. However, there is considerable question regarding whether Alpine undertook to fill in the pit with the permission of appellant or exceeded any permission given. We need not resolve either question because it is clear that Alpine cannot be cited by OSMRE for actions taken outside the permitted area which do not constitute "surface coal mining and reclamation operations" governed by the State equivalents of SMCRA and its implementing regulations. 30 U.S.C. | 1291(27) (1982); see Turner Brothers Inc. v. OSMRE, 102 IBLA 111, 125-26 (1988).

Section 701(27) of SMCRA, 30 U.S.C. | 1291(27) (1982), defines "surface coal mining and reclamation operations" as "surface mining operations and all activities necessary and incident to the reclamation of such operations." Id. The term "surface coal mining operations" is further defined in section 701(28) of SMCRA, 30 U.S.C. | 1291(28) (1982), as the activities conducted on the surface of lands in connection with a surface coal mine and the areas upon which such activities occur or which are disturbed by such activities. Included are "refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings * * * resulting from or incident to such activities." Id.

Generally, the removal and placement of overburden from a permitted area in connection with a surface coal mine must be considered "surface coal mining operations" within the meaning of the statute, even where the overburden is placed outside the permitted area. Cf. Tommy Carpenter, 88 IBLA 286, 92 I.D. 383 (1985). Indeed, applicable statutory and regulatory pro-visions govern the placement of overburden. See 30 U.S.C. | 1265(b)(22) (1982); 30 CFR 816.71. On appeal, appellant maintains that the open pit was filled with "overburden * * * pushed * * * from the new pit." We presume that, by the "new pit," appellant meant the nearby channel to which he also

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1/ We note that appellant originally placed the pit entirely outside the permitted area in the first map received by OSMRE. However, in the subsequent map, appellant placed the pit partially within and outside the permitted area, apparently in error. Appellant has continued to describe the affected pit as situated outside the permitted area.

objects. 2/ However, that pit is, according to appellant, situated both within and outside the permitted area. Thus, we are not in a position to judge whether overburden purportedly placed in the open pit came from within or outside the permitted area.

Moreover, in any case, we cannot determine whether the overburden resulted from activities conducted in connection with the surface coal mine. In its July 1986 letter to ODOM, Alpine stated, to the contrary, that the work involved the "reclamation of old spoils * * * which [work] was not related to our mining activity." Appellant has failed to demonstrate that the purported removal and placement of overburden was associated with Alpine's surface coal mine and, thus, could be considered "surface coal mining and reclamation operations" within the meaning of the statute. Thus, OSMRE had no basis for citing Alpine for a violation of the State equivalent of SMCRA or its implementing regulations.

Next, appellant alleges that a channel was dug cutting off access to the eastern portion of his property. The map received with appellant's complaint filed on December 29, 1986, places the channel partially within the permitted area. In its initial investigation report, OSMRE stated that Alpine had "corrected this problem." The context of the remark indicates that the problem concerned the fact that the channel purportedly "prevent[ed] [appellant] from [gaining] access to his eastern property." However, OSMRE does not state how the problem was corrected. In his response to that report, appellant suggested that the channel had been filled in but that Alpine had again created a channel by removing dirt. On appeal, OSMRE maintains that the channel, which is characterized as having gentle slopes, is "needed to provide drainage to the permanent impoundment" 3/ and comports with applicable regulations, and that, so far as access is concerned, Alpine has corrected the problem. Appellant admits that "Alpine did rework this where I can get into the area," but asserts that this was a temporary arrangement.

From the situation as presented to the Board, we cannot conclude that Alpine has violated any provision of the State equivalent of SMCRA or its implementing regulations in mining and reclaiming the area of the channel, for which violation Alpine should have been cited by OSMRE. For instance, appellant has not established that Alpine failed to restore the land to its approximate original contour, in accordance with section 515(b)(3) of SMCRA,

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2/ We note, however, that, in his original complaint received by OSMRE on Dec. 19, 1986, appellant stated that the dirt from the channel was used "to fill my neighbor's pit," rather than the open pit allegedly filled in on his property.

3/ According to the map submitted by appellant on Dec. 29, 1986, the channel actually would direct runoff into the pit located off the permitted area on appellant's property, rather than into the permanent impoundment previously discussed. In any case, appellant failed to establish that this was inconsistent with the approved State permit.

30 U.S.C. | 1265(b)(3) (1982), and 30 CFR 816.102. Compare Turner Brothers, Inc. v. OSMRE, 102 IBLA 323 (1988), with Kenneth Marsh, 82 IBLA 3 (1984). Moreover, appellant has not established that the channel does not comport with the reclamation plan under the approved permit. Nor has appellant referred to any applicable statutory or regulatory provision which has been violated. To the extent that appellant has not received the specific quality of access he desires, as OSMRE notes, that is a matter to be resolved between appellant and Alpine. There is nothing in the State equivalent of SMCRA or its implementing regulations which requires the intervention of OSMRE.

Finally, appellant alleges that Alpine was removing topsoil from his property and placing it on other property. Initially, appellant identified one portion of the permitted area where topsoil had been removed, but then also referred to another portion in his subsequent submission. In response, OSMRE agreed that Alpine had moved topsoil from one portion of the permitted area to another but stated that Alpine was permitted to do so as long as 6 inches of topsoil was "replaced on all areas." Appellant countered that there was no topsoil on his property as a result. In his subsequent investigation review report, OSMRE reclamation specialist Lett disagreed that there was no topsoil on appellant's property but concluded, on the basis of an analysis of an aerial photograph taken prior to the initiation of Alpine's mining operations and examination of the property in March 1987, that topsoil had been replaced only on those areas where there had originally been topsoil and that the area pointed out by appellant had, as a consequence of previous mining, not contained topsoil. On appeal, appellant reiterates only that topsoil had been removed from his property and, there-fore, "there was no topsoil left to spread on my property."

From the record, we are unable to conclude that OSMRE should properly have cited Alpine for any violation of the State equivalent of SMCRA or its implementing regulations with respect to the removal and placement of topsoil. Again, appellant has not cited any statutory or regulatory provision which has been violated, and we can discern none. In fact, in accordance with section 515(b)(5) and (6) of SMCRA, 30 U.S.C. | 1265(b)(5) and (6) (1982), and 30 CFR 816.22, an operator may, with the approval of the regulatory authority, remove subsoil from an area where topsoil is of insufficient quantity and then restore it following the completion of mining where it is suitable for sustaining vegetation. See Alabama By-Products Corp., 1 IBSMA 239, 86 I.D. 446 (1979). Appellant has not demonstrated that Alpine has violated these standards.

Specifically, appellant has not provided any evidence to support his contention that his property is entirely devoid of topsoil as a result of mining or, moreover, that topsoil was not replaced on areas which had originally contained topsoil prior to the initiation of mining operations by Alpine. At best, the record indicates that appellant pointed out a specific area which does not now contain topsoil. However, he has not refuted Lett's conclusion that this was an area which had originally not contained topsoil as a result of previous mining activities. Finally, appellant has failed to establish that the failure to replace topsoil on areas which, prior to the

initiation of mining operations, did not contain topsoil constitutes a violation of the State equivalent of SMCRA or its implementing regulations.

We conclude that there is no evidence that, during the course of its mining and reclamation operations, Alpine violated any provision of the State equivalent of SMCRA or its implementing regulations, which violation should properly have been the subject of a Federal enforcement action. Thus, we affirm the Assistant Director's March 1987 decision concluding no issuance of a notice of violation was required. Dennis Zaccagnini, 96 IBLA 97 (1987); Kenneth Marsh, supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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John H. Kelly
Administrative Judge

I concur:

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David L. Hughes
Administrative Judge